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No. 87-2035

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In the Supreme Court of the United States

OCTOBER TERM, 1988

NATHAN GORDON, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

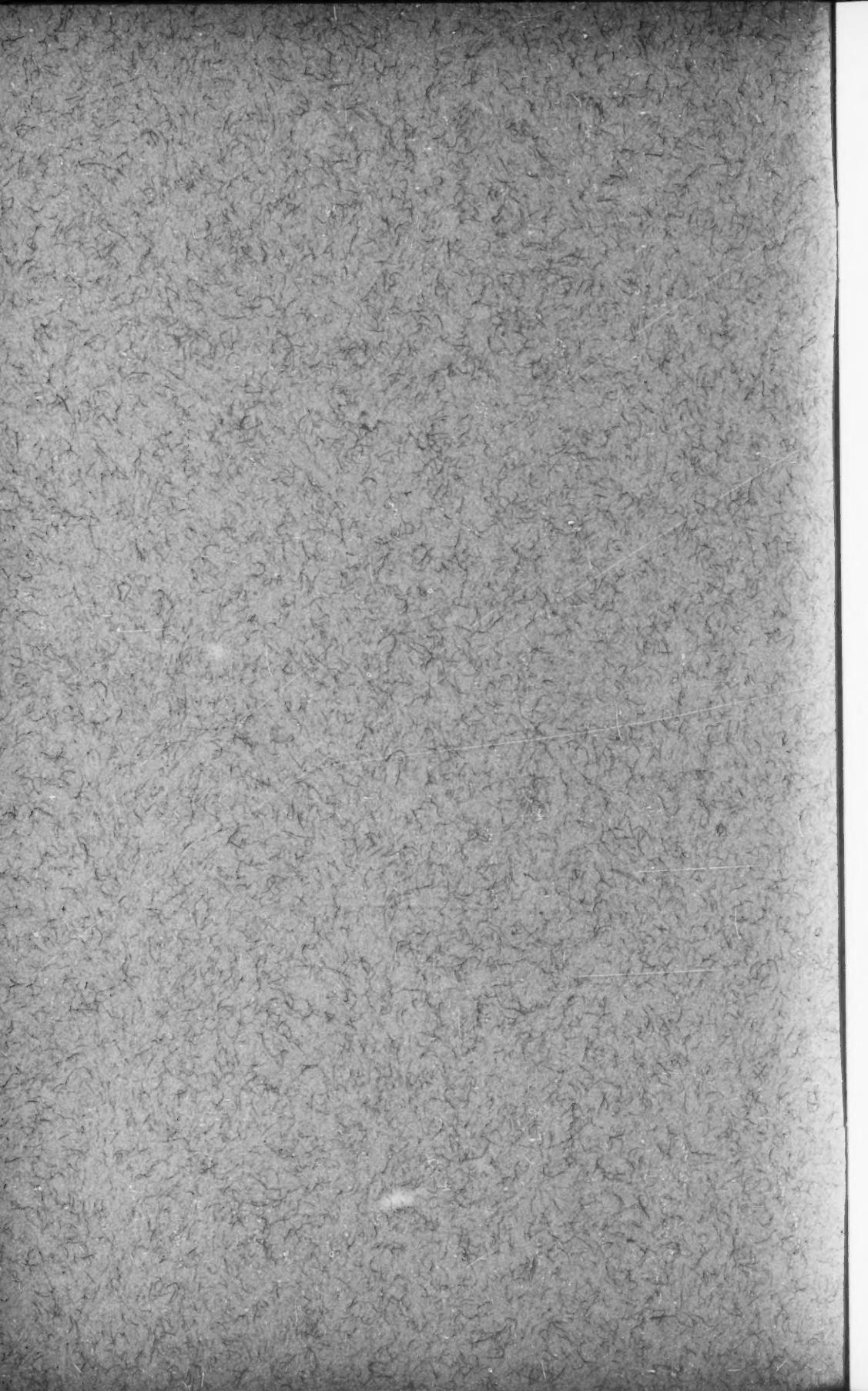
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QUESTION PRESENTED

Whether the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*), as extended by the Clarification Act (50 U.S.C. App. 1291) to cover merchant seamen employed on ships owned or operated by the War Shipping Administration during World War II, waives the sovereign immunity of the United States with respect to maritime tort claims arising out of discretionary government functions.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 835 F.2d 96. The opinion of the district court (Pet. App. 20-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1988. A petition for rehearing was denied on February 24, 1988 (Pet. App. 13-14). The petition for a writ of certiorari was filed on May 24, 1988, and was served upon the United States on June 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During World War II, the War Shipping Administration (WSA) was created to assume control of the

nation's merchant marine, to provide for its rapid expansion, and to ensure its effective use in prosecution of the war. See Exec. Order No. 9,054, 3 C.F.R. 1086 (1938-1943 comp.). Most of the merchant marine vessels, both pre-existing vessels and those built to U.S. Maritime Commission specifications during the war, were operated by private shipping companies pursuant to general agency agreements with WSA. See Report of the War Shipping Administrator to the President, *The United States Merchant Marine at War* 33, 39-40 (1946). As a result of this hybrid arrangement, it was unclear whether seamen injured while sailing on these vessels had causes of action against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (which covered government merchant vessels) or against the private shipping companies under the Jones Act, 46 U.S.C. 688 (which covered private merchant vessels). See S. Rep. 62, 78th Cong., 1st Sess. 5-6 (1943); H. R. Rep. 2572, 77th Cong., 2d Sess. 9 (1942).

To clarify the status of seamen on the government-controlled, national merchant fleet, Congress enacted the War Shipping Administration Clarification Act of 1943, ch. 26, § 1(a), 57 Stat. 45 (codified at 50 U.S.C. App. 1291). This Act provided, as relevant here, that seamen employed through the War Shipping Administration shall "have all the rights, benefits, exemptions, privileges, and liabilities" with respect to "death, injuries, illness, maintenance and care, loss of effects, detention, or repatriation" of seaman on privately owned and operated vessels. The statute further provided that claims for such maritime injuries would "be enforced pursuant to the provisions of the Suits in Admiralty Act * * *, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act" (*ibid.*). The effect of the Clarification Act, therefore, was to broaden the scope of the Suits in Admiralty Act "by per-

mitting seamen on merchant vessels that were owned by the United States, or bareboats chartered to the WSA, to sue the United States instead of the private company that owned the vessels" (Pet. App. 3).

2. During World War II, petitioner Nathan Gordon worked in the engine room of a number of "Liberty" merchant ships. The engine rooms of these ships were heavily insulated with asbestos. Claiming that he contracted cancer as a result of working on these ships (Pet. App. 2), Gordon and his wife filed an admiralty suit in the United States District Court for the Southern District of Florida against a private steamship company. The action was transferred to the Eastern District of Louisiana and consolidated with a number of other marine asbestos cases. Petitioners then filed an amended complaint naming additional defendants, including the United States. Petitioners claimed "that the construction of ships using asbestos insulation, the operation of ships already built with asbestos insulation, and the failure to maintain safe working conditions in an asbestos-surrounded environment were negligent actions" for which the United States should be held liable (*id.* at 9).

The district court (Pet. App. 20-24) dismissed the suit against the United States for lack of jurisdiction. The court noted (*id.* at 21) that it was well established that the United States had not waived its sovereign immunity under the Suits in Admiralty Act with respect to maritime tort claims arising out of discretionary government functions. After examining the functions in issue here, the court concluded (*id.* at 23) that "the challenged governmental conduct, whether it be in ship construction or in ship operations during the time of World War II, was intended by Congress to be shielded from tort liability."

3. The court of appeals affirmed (Pet. App. 1-12). The court first noted (*id.* at 5-8) its continued "agree[ment]

with other circuits" that the Suits in Admiralty Act, despite a lack of any express language to that effect, does not waive sovereign immunity for discretionary government functions. The court then rejected (*id.* at 8) petitioners' suggestion that the Clarification Act mandates a different result for suits brought by merchant seaman sailing on WSA-operated vessels. The Clarification Act, the court noted (*ibid.*), "utilizes the [Suits in Admiralty Act] to make its authorized claims enforceable." The Clarification Act must therefore be understood as limited by the same discretionary function exception applicable to the Suits in Admiralty Act. The court also emphasized (*ibid.* (citation omitted)) that the discretionary function exception derives from "a 'combination of the doctrines of sovereign immunity and separation of powers' " that is fully implicated here.

In applying the exception to the facts of this case, the court noted (Pet. App. 11) that there was "a substantial amount of historical evidence showing that the use of asbestos [on specially-commissioned World War II merchant vessels] was consistent both with the policy of building the ships rapidly and the existing standard design." The court compared (*id.* at 9-11) the program for the use of existing merchant ships and the rapid production of new ships, pursuant to design standards chosen by the United States, with the fertilizer production program at issue in *Dalehite v. United States*, 346 U.S. 15 (1953). "[G]overnmental discretion," the court noted (Pet. App. 10 (quoting 346 U.S. at 35-36)), "includes not only the initiation of programs and activities, but also 'determinations made by executives or administrators in establishing plans, specifications or schedules of operations.'" The court concluded (Pet. App. 12) that the government's "critical discretionary decision" to use the existing standard design could not "be overcome by clothing the discretionary act

in the maritime uniform of a breach of a duty to provide a seaworthy vessel." The court further concluded (*id.* at 11-12) that the decision not to establish a safety program for seamen working on asbestos-containing vessels was also discretionary.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. The Suits in Admiralty Act waived the sovereign immunity of the United States for certain maritime claims. 46 U.S.C. 741 *et seq.*; see generally *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976).¹ The Act does not expressly provide for an exception from liability for "discretionary" governmental acts, analogous to that found in the Federal Tort Claims Act (28 U.S.C. 2680(a)). Nevertheless, every court of appeals that has addressed the question has concluded that a discretionary function exception is implicit in the Suits in Admiralty Act. See, e.g., *Brown v. United States*, 790 F.2d 199 (1st Cir. 1986), cert. denied, No. 86-528 (Jan. 20, 1987); *Wiggins v. United States*, 799 F.2d 962, 964-966 (5th Cir. 1986); *Williams v. United States*, 747 F.2d 700 (11th Cir.

¹ "[T]he Suits in Admiralty Act does not itself provide a cause of action against the United States. Instead, it only acts as a waiver of the sovereign immunity of the United States in admiralty suits. * * * Thus, the act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim." *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 443-444 (5th Cir. 1982) (footnote and citation omitted). In this case, petitioners alleged a substantive cause of action under the Jones Act (46 U.S.C. 688), which provides a cause of action for seamen injured by the negligence of their employer.

1984), aff'g 581 F. Supp. 847 (S.D. Ga. 1983); *Gemp v. United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Bearce v. United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980); *Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977).²

2. Petitioners do not directly challenge this uniform judicial conclusion that the Suits in Admiralty Act does not waive sovereign immunity for discretionary government functions. Instead, petitioners contend that the Clarification Act constitutes such a waiver for the specific class of cases covered by that Act. But the Clarification Act merely allowed actions under the Suits in Admiralty Act by a class of plaintiffs about whose status there was some confusion—merchant seamen sailing on vessels chartered or owned by the WSA during World War II. It did not otherwise expand the right to sue granted by the Suits in Admiralty Act or waive the government's sovereign immunity over discretionary executive func-

² In an early decision, the Fourth Circuit appeared to reject the application of the discretionary function exception in admiralty cases. *Lane v. United States*, 529 F.2d 175 (1975). However, subsequent Fourth Circuit decisions contradict the decision in *Lane*. For example, in *Faust v. South Carolina State Highway Dep't*, 721 F.2d 934 (1983), cert. denied, 467 U.S. 1226 (1984), the court held that the United States could not be liable in tort under the Suits in Admiralty Act for issuing a permit that authorized the maintenance of an obstruction in a navigable waterway. Although the *Faust* court did not expressly frame the issue in terms of the discretionary function exception, the court emphasized (*id.* at 938) the discretion afforded to the Corps of Engineers "to fulfill its statutory mandate to regulate obstructions placed in the navigable waterways" and cited (*id.* at 937) in support of its decision a number of cases applying the discretionary function exception. See also *Mugno v. Corros*, 630 F.2d 224, 228 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981).

tions, an immunity the courts have uniformly recognized is preserved by that Act. The purpose of the Clarification Act was not to institute a major revision in government maritime law nor to create new and unprecedented liability for the United States. Rather, as the very title of the Act implies, it was intended simply to clarify the status of all seamen employed on ships controlled by the WSA by confirming that they were entitled to sue under the Suits in Admiralty Act. See S. Rep. 62, 78th Cong., 1st Sess. 11 (1943) ("Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act in all respects. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure.").

Petitioners contend (Pet. 9-12) that Congress intended to provide merchant seamen aboard WSA-owned or WSA-chartered vessels the same rights applicable to seamen on privately owned and operated ships. That is true, but merely a reaffirmation of the underlying purpose of the Suits in Admiralty Act itself. The primary purpose of the Suits in Admiralty Act from its inception was to confer upon private shipowners, ship operators, and seamen rights of recovery from the government for damages by government vessels parallel to those they would have against private parties. *Eastern Transp. Co. v. United States*, 272 U.S. 675, 690-691 (1927); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 227-228 (1945). But that purpose, like the corresponding purpose of the Federal Tort Claims Act, can be reconciled with the retention of immunity for discretionary government functions.³

³ Petitioners cite (Pet. 12-14) a number of decisions in which successful maritime claims were maintained against the United States by seaman injured on WSA vessels. As petitioners concede (*id.* at 13),

3. Even if the Clarification Act, as here relevant, can be read to do more than clarify the rights of WSA seamen to pursue a remedy under the Suits in Admiralty Act, it would be incongruous to allow WSA seamen to pursue actions based on discretionary functions. This Court has observed that at the time that Congress enacted the Federal Tort Claims Act "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984). This is because "the exemption for discretionary functions * * * was derived from the doctrine of separation of powers, a doctrine to which the courts must adhere even in the absence of an explicit statutory command" (*Canadian Transp. Co. v. United States*, 663 F.2d at 1086). Judicial scrutiny of discretionary Executive Branch determinations would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and thereby implicate separation of powers concerns (*Varig Airlines*, 467 U.S. at 814). Congress believed that the courts would avoid improper interference with Executive Branch decisionmaking by construing the Tort Claims Act to bar tort actions arising out of discretionary government determinations.

however, the discretionary function exception was not raised or addressed in any of those cases. Thus, those decisions shed no light on the question presented in this case; nor do they establish any conflict among the circuits. Indeed, most of the courts whose decisions are cited by petitioners subsequently addressed the question squarely and held that the discretionary function exception does apply to suits brought under the Suits in Admiralty Act.

Congress included an express discretionary function exception in the Tort Claims Act "to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administration action" (*Varig Airlines*, 467 U.S. at 810). But even in the absence of such an exception from tort liability under the Suits in Admiralty Act, "respect for the doctrine of separation of powers requires that * * * courts should refrain from passing judgment on the appropriateness of actions of the executive branch which meet the requirements of the discretionary function exception of the [Tort Claims Act]" (*Canadian Transp. Co. v. United States*, 663 F.2d at 1085). Otherwise, "every decision of a government official cognizable under [the] Act would be subject to second-guessing by a court on the claim that the decision was negligent" (*Wiggins v. United States*, 799 F.2d at 966).

This prohibition against judicial "second-guessing" of policy decisions by the Executive Branch is equally applicable to suits brought under the Clarification Act. Indeed, the prohibition is particularly imperative where, as here, the suit touches upon sensitive and difficult choices made during a time of national emergency and executed pursuant to the President's constitutionally endowed "war powers." Whether the Maritime Commission should have deviated from its emergency policy of constructing merchant ships pursuant to a standardized design based on existing industry standards or whether the WSA should have undertaken a duty to warn seamen on WSA merchant ships during the war about the hazards of asbestos or taken other special measures to reduce the risks are matters that plainly fall within the protective ambit of the discretionary function exception. The Maritime Commission and the WSA determined to exercise administrative discretion in single-minded pursuit of a policy objective of

the highest order—winning the war. The courts below properly declined petitioners' invitation to rejudge, some 45 years after the fact, whether these decisions reflected negligent judgments rather than defensible choices necessary for the successful prosecution of the war.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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